Supreme Court, U.S.
FILED

091186 MAR 31 2010

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No. 09-___

IN THE

Supreme Court of the United States

JOHN ERROL FERGUSON
OR DOROTHY FERGUSON, INDIVIDUALLY
AND AS NEXT FRIEND ON BEHALF OF
JOHN ERROL FERGUSON,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
WALTER A. MCNEIL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's decision, which issued three months before this Court summarily reversed a different Eleventh Circuit opinion applying the same rule of decision, should likewise be summarily reversed or, at the least, vacated and remanded for further consideration in light of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009).

2. Whether the Eleventh Circuit correctly held—in conflict with decisions of this Court and at least four other circuits—that a petitioner suffers no prejudice where (i) his counsel failed to present any significant mitigation evidence during a capital-sentencing hearing and (ii) there existed substantial evidence concerning the petitioner's acute mental-health deficiencies and history of childhood abuse and privation.

3. Whether, in conflict with this Court's decisions, the Eleventh Circuit correctly held that a jury instruction to consider only statutory mitigation evidence in direct violation of *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), was harmless error.

PARTIES TO THE PROCEEDING

Petitioner John Errol Ferguson, or Dorothy Ferguson (as next friend on behalf of John Errol Ferguson), was petitioner in the District Court and appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondent Walter A. McNeil, Secretary for the Department of Corrections, was respondent before the District Court and appellee before the United States Court of Appeals for the Eleventh Circuit.

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SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Errol Ferguson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 580 F.3d 1183 (11th Cir. 2009) and is reproduced in

[1] For purposes of recusal, counsel for petitioner states that Hogan & Hartson LLP began representing petitioner in this matter in 1987.

the appendix to this petition ("App.") at 1a. The District Court's decision is unreported and is reproduced at App. 78a.

JURISDICTION

The Eleventh Circuit's judgment issued August 25, 2009. A timely filed petition for rehearing *en banc* was denied on December 31, 2009. App. 134a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

INTRODUCTION

In *Porter* v. *McCollum*, 130 S. Ct. 447 (2009), decided earlier this Term, this Court summarily reversed an Eleventh Circuit decision because the panel in that death-penalty habeas case had "unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Id.* at 454. Relying on a line of authority that began with *Williams* v. *Taylor*, 529 U.S. 362 (2000), this Court emphasized the obvious prejudice a petitioner suffers when—despite the existence of compelling mitigating evidence—the "judge and jury at * * * sentencing hear[ ] almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability." *Porter*, 130 S. Ct. at 454.

This petition arises from another Eleventh Circuit decision issued three months before this Court's ruling in *Porter* (and by a panel that contained two of the three judges who were on the *Porter* panel).

Because the decision on review made the same mistakes that the panel's decision in *Porter* did, this Court should follow suit and summarily reverse. Alternatively, the Court should grant the petition and set the case for plenary hearing or, at the very least, vacate the judgment and remand to the Eleventh Circuit for further consideration in light of *Porter*.

There is no question that this Court's decision in *Porter* is outcome determinative. As in *Porter*, the petitioner here, John Ferguson, was convicted of multiple murders for which the Florida courts found multiple aggravating factors. As in *Porter*, due to counsel's stunningly deficient performance, *no* significant mitigation evidence was ever offered to the jury. And as in *Porter*, that failure was demonstrably prejudicial, for "[t]his is not a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.' " *Porter*, 130 S. Ct. at 454 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 700 (1984)). Just the opposite. But for counsel's neglect, Ferguson's juries "would have learned of the 'kind of troubled history [this Court] has declared relevant to assessing a defendant's moral culpability.' " *Id.* (quoting *Wiggins* v. *Smith*, 539 U.S. 510, 535 (2003)). They would have heard how Ferguson spent most of a decade in state-run mental hospitals. They would have heard how during that span he was examined at least eleven times, by seven different state-appointed doctors. They would have heard that every single one of those doctors diagnosed Ferguson as schizophrenic, psychotic, or hallucinating. They would have heard and read the reports of these psychiatrists, many of whom concluded that

Ferguson had "grossly impaired" judgment, that he cannot "understand[ ] the nature and consequences of his acts," and that he therefore should remain committed "for long-term psychiatric treatment." Hrg.Ex.36. They would have heard that, during one of Ferguson's brief respites from Florida's mental hospitals, he had been arrested on robbery charges but was ultimately found not guilty by reason of insanity. And they would have heard of the shocking abuse, violence, and privation Ferguson experienced as a child. *See infra* 5-10.

The Eleventh Circuit nevertheless found that counsel's failure to present any of this to the sentencing juries did not prejudice Ferguson. It did so because it relied on the same flawed approach that this Court rejected in *Porter*. Given the "extreme" facts of these crimes, App. 20a, the panel concluded that the large body of undisclosed mitigating evidence would not reasonably "lead a jury to *disregard* such cruel circumstances and impose a different sentence." *Id.* (emphasis added). But the test is not whether mitigating evidence is so powerful that it would actually cause a jury to "disregard" the brutality of a murder; it is doubtful that any evidence could ever do that. Instead, the touchstone remains the petitioner's moral culpability: Was the sentencing jury deprived of hearing "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability.'" *Porter*, 130 S. Ct. at 454 (quoting *Williams*, 529 U.S. at 398). Because the Eleventh Circuit's rule squarely conflicts with this Court's precedents, the petition should be granted.

STATEMENT OF THE CASE

A. Factual Background.

1. Ferguson's Childhood.

John Ferguson had a childhood defined by poverty, abuse, and privation. Forced to move nearly a dozen times to escape violent men—first his alcoholic father, later his mother's multiple boyfriends—Ferguson spent his formative years shuttling among squalid one-bedroom houses or apartments. Eight family members (and sometimes additional strangers) would cram into these blighted accommodations, many of which lacked such basics as electricity and running water. R.2922-23, 2958, 2963.[2]

But the frequent moves ultimately failed to shield Ferguson from violence. When drunk, Ferguson's abusive and alcoholic father would grab his mother by her hair and "throw [her] upside the wall." R.2924. Ferguson was five years old when police forcibly removed his father from the family's one-bedroom house, R.2924-25; his mother then moved Ferguson and her other children to a housing project where she frequently disciplined him with an iron cord, R.2926, 2995, and regularly left him in the care of an older sibling who beat him. R.2957, 2991-93, 3001.

For a time Ferguson and his siblings lived with one of his mother's boyfriends, who would abuse his

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[2] Because the Eleventh Circuit does not use a traditional joint appendix, the record citations in this petition reference multiple sources, as described in Ferguson's Eleventh Circuit Brief for Appellant at xv.

mother in front of Ferguson. R.2930, 2932-33. Ferguson was forced to intervene to "protect [his] mother" when he was thirteen. R.2933, 2961. The family then spent two years on the run while his mother's abusive boyfriend continued to track them, attacking and beating Mrs. Ferguson, stabbing her with a knife, and once shooting at the family's home. R.2961-62, 2974.

Ferguson's home life—such as it was—followed a sad and familiar pattern: Once Mrs. Ferguson found a new boyfriend or reconciled with an abusive one, she would often abandon Ferguson and his siblings. For instance, when Ferguson was about 11 years old, his mother deserted him and several of his siblings in an empty house overrun by snakes, scorpions, and chickens, R.2963, 3063, and lacking electricity or indoor plumbing, R.2934, 2963, 3063. He and two of his sisters were so agitated and lonely in that house that one day they attacked and killed the chickens in the yard because, as another sister explained, we "couldn't take it out on anybody else." R.3063.

Also around this time, Ferguson's father died of conditions resulting from alcohol abuse. R.2936. A few months after his father's death, Ferguson was committed to a state school. R.3096. He ultimately dropped out in the ninth grade. Hrg.Ex.35. A court-ordered medical report indicates Ferguson was "beat up by kids and has been a loner throughout his life." *Id.*; *see* Hrg.Ex.37 (same).

When Ferguson was 21, he was shot four times, including once in the head. Hrg.Ex.35, R.3011. That incident changed him forever. Immediately after returning from the hospital, Ferguson began to exhibit profound mental instability, irrationality,

and inexplicable hostility—conditions that would deteriorate with time. R.1536, 2943-44, 2968-69, 2976-78, 3011-15.

2. Ferguson's History Of Mental Illness.

Ferguson has a long history of mental illness. From 1969—the year he was shot—until 1978—the year he was arrested—he spent most of the time in mental hospitals. R.3093, 3098. He was examined at least eleven times, by seven different doctors, and every single one of them diagnosed Ferguson as schizophrenic, psychotic, or hallucinating. R.1589-1601; Hrg.Exs.34-43. In the mid-1970s, he was arrested on robbery charges for which he was ultimately found not guilty by reason of insanity. R.3054.

The reports of the court-appointed psychiatrists who examined Ferguson during this decade-long hospitalization portray a deeply disturbed mind. In 1971, Dr. Paul Jarrett observed that Ferguson "is functioning as a paranoid schizophrenic," "would be suggestible to various unwise influences upon him," and has such a "severely damaged ability to distinguish between right and wrong" that the doctor thought Ferguson "would commit illegal acts." Hrg.Ex.34. Ferguson told Dr. Jarrett that he heard voices, conversed regularly with his dead father, did not sleep on his jail bed because "they" put scorpions on his bed, and set fire to his jail cell "to keep them from coming in." *Id.* The doctor unequivocally recommended "psychiatric confinement." *Id.*

Also in 1971, Dr. Charles Mutter examined Ferguson during a state-ordered psychiatric examination. He found Ferguson's affect was

"inappropriate," he "showed evidence of auditory and visual hallucinations," he reported conversations "day and [ ] night" with his deceased father, and his judgment was "impoverished." Hrg.Ex.35. Dr. Mutter's diagnosis was clear: Ferguson was suffering from "paranoid schizophrenia," a "major mental disorder" that left him unaware of the consequences of his acts and "unable to adhere to the right." *Id.* Dr. Mutter recommended that Ferguson "be committed to a state hospital." *Id.* He reevaluated Ferguson in 1973 and reiterated that Ferguson "was suffering from a major mental disorder, namely paranoid schizophrenia," which "was characterized by hallucinations and a delusional system." Hrg.Ex.36. Dr. Mutter reported that Ferguson was still conversing with his deceased father, had an "inappropriate" affect, "marked autism," and "a persecutory delusion," and was hearing voices. *Id.* Ferguson, in Dr. Mutter's medical judgment, had "grossly impaired" judgment, "is dangerous to others," and cannot "understand[ ] the nature and consequences of his acts." *Id.* Dr. Mutter again recommended that Ferguson remain committed "for long-term psychiatric treatment." *Id.*

In 1973, Dr. Albert Jaslow became the third court-appointed doctor to evaluate Ferguson and determine that he was "psychotic and incompetent and requires additional hospitalization and treatment." Hrg.Ex.37. As Dr. Jaslow noted, "his reality testing was defective," he was "actively psychotic," he reported conversations with his deceased father, and he described headaches caused by roaches and "very small" people placed inside his brain. *Id.*

In 1974, a fourth court-appointed psychiatrist, Dr. William Corwin, evaluated Ferguson. Hrg.Ex.38. Dr. Corwin, like Drs. Jarrett, Mutter, and Jaslow before him, reported that Ferguson "is suffering from a psychosis, schizophrenia, of a chronic nature" and should remain hospitalized for further treatment. *Id.* He again confirmed that Ferguson's judgment was "impaired" and noted that Ferguson's "[h]allucinations and delusions [we]re freely expressed." *Id.* Dr. Corwin evaluated Ferguson later in 1974 and he reaffirmed his diagnosis: schizophrenia of a chronic nature. Hrg.Ex.39.

In 1975, Dr. Stillman became the fifth psychiatrist to evaluate Ferguson and observe—like each of the four court-appointed psychiatrists before him—that "[c]linically we are dealing with a grossly disturbed young man who demonstrates a clinical picture of a severe psychosis, a major mental disorder, of the schizophrenic variety, paranoid type." Hrg.Ex.40. Ferguson expressed "a good deal of delusional material of a paranoidal nature and admitted to hallucinatory experiences of a visual type," "did not understand the motives for his behavior," "does not know right from wrong and does not know the nature and consequences of his acts." *Id.* Dr. Stillman issued a warning: Ferguson should be continuously treated in a secure setting because his "degree of irrationality coupled with a rather impulsive, explosive and aggressive nature makes him a rather dangerous person both to himself and to others." *Id.*

In 1975, Dr. Mutter's re-examination of Ferguson again revealed that Ferguson had an "inappropriate" affect, "was autistic," had hallucinations and persecutory delusions, and was suffering from

paranoid schizophrenia. Hrg.Ex.41. Dr. Mutter warned that Ferguson "is dangerous to the point where he is considered homicidal" and "should be in a maximum security ward." Dr. Mutter's forewarning: "He needs long-term psychiatric treatment and should not be released under any circumstances." *Id.* He reiterated that warning a month later, emphasizing that Ferguson "has a long-standing, severe illness which will most likely require long-term inpatient hospitalization. This man is dangerous and cannot be released under any circumstances." Hrg.Ex.42.

Despite the repeated warnings of the court-appointed psychiatrists that Ferguson was "extremely dangerous," should remain hospitalized, and did "not know right from wrong" or "the nature and consequences of his acts," Ferguson was deemed "mentally competent" and discharged.

B. The Crimes.

The psychiatrists' uniform clinical predictions proved prescient. On July 27, 1977, Ferguson, Marvin Francois, and another man entered a home in Carol City, Florida looking for drugs and money. After Francois' mask fell and revealed his face, six of the eight people in the house were shot and killed. The evidence later showed that Francois was the "triggerman" who killed at least five of the six victims. RCC 712. Ferguson was directly linked to one shot, which grazed one victim; she was treated and released from a hospital the next day. RCC 351. Ferguson had tried to dissuade Francois from killing anyone, RCC 447, and had attempted to comfort some of the victims. RCC 321-23, 343, 351.

Six months later, on January 8, 1978, the bodies of two teenagers in Hialeah, Florida were found. Both had been shot in the head; one had been sexually assaulted. When Ferguson was arrested pursuant to a warrant for unlawful flight to avoid prosecution for the Carol City murders, on April 5, 1978, the police found a gun in his possession capable of firing bullets matching those used to kill the two teenagers in Hialeah. App. 5a.

C. Trial Proceedings.

Ferguson was tried on six counts of first degree murder in the Carol City case and two counts of first degree murder in the Hialeah case (among other charges). The cases were tried before separate juries, but the same judge presided over both trials and Ferguson's initial sentencing proceedings.

Ferguson was convicted of murder in both cases. But Ferguson's counsel put on *no* mitigation evidence—none—about his long history of mental illness or his harsh and violent early upbringing during the sentencing phases of the two trials.

Ferguson's counsel in the Carol City trial, Fred Robbins, later admitted that he did not investigate either Ferguson's history of diagnosed mental illness or his stunted childhood. R.3035, 3051. Instead, the sum total of Robbins's mental-health investigation was to read the reports of four psychiatrists appointed by the court after Ferguson initially entered an insanity plea. Those reports noted that Ferguson had undergone numerous other psychiatric examinations, but Robbins did not attempt to locate those records. Nor did he examine Ferguson's criminal records—which would have shown that

Ferguson previously had been found not guilty by reason of insanity. Nor did he attempt to locate other public records about Ferguson and his long history of illness and confinement on mental-health grounds. Nor did he ask Ferguson's mother and sister about his upbringing. Nor did he contact Ferguson's other siblings seeking insights or mitigating testimony. At the end of Robbins's desultory efforts, at the sentencing phase, Robbins called a single witness—Ferguson's mother—from whom he elicited 76 words of "unilluminating" testimony. App. 17a n.7. Robbins later testified that had he known of Ferguson's mental-illness records and insanity acquittal, he would have presented that information during the penalty phase. R.3035, 3052-55.

Ferguson's counsel in the second trial delivered the same stunningly subpar representation: "In the penalty phase of the Hialeah trial, no mitigating evidence was presented by the defense." *Ferguson* v. *State*, 593 So. 2d 508, 511 (Fla. 1992). Michael Hacker, the attorney in charge of the penalty phase of the Hialeah trial, did not investigate Ferguson's upbringing because he erroneously believed that evidence of nonstatutory mitigating circumstances was inadmissible. R.3165-66. He also failed to discuss mitigation with Ferguson's siblings. And although he called Ferguson's mother to the stand to testify during the penalty phase, he excused her without eliciting a single word of testimony because "she broke down on the witness stand." App. 21a, 119a-120a. While some of Ferguson's mental-health history came into evidence during the guilt phase of the trial as part of an unsuccessful insanity defense, at no point during the mitigation stage did

Ferguson's counsel put mental-health experts on the stand to speak to his long and consistent diagnoses.[3]

Compounding his counsels' failure to investigate or present significant mitigating evidence, the judge in both trials erroneously instructed the juries that they could consider only statutory mitigating circumstances. As the panel below acknowledged, App. 31a, 35a, that instruction clearly violated this Court's decision in *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987); indeed, it was the exact same Florida jury instruction that this Court struck down in *Hitchcock* for improperly precluding the jury "from considering any relevant mitigating evidence." *Id.* at 394. The jury's inability to consider nonstatutory mitigating evidence was particularly damaging during the Hialeah trial. That is because, although Ferguson's lawyer failed to proffer a shred of evidence or testimony during the sentencing phase, he had nevertheless alluded to some—though certainly not all—of Ferguson's troubling mental-health history during the guilt phase as part of the unsuccessful insanity defense. But to the extent the jury even considered that evidence, it could do so only if it satisfied one of the narrow statutory mitigating factors. Yet despite those restrictions, at least two jurors voted to spare Ferguson's life in the Hialeah trial. App. 21a.[4]

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[3] The standard for finding statutory mitigating circumstances is lower than the standard for finding a defendant not guilty by reason of insanity. *Compare* Fla. Stat. § 921.141(6)(b) *with* § 921.141(6)(f) (1977).

[4] It is entirely possible that as many as five jurors voted to spare Ferguson's life. The uncertainty stems from the trial judge's decision to cut short the jury poll. The judge had asked

The juries in both cases ultimately recommended the death penalty. The single judge hearing both cases imposed it.[5]

D. State Post-Conviction Proceedings.

In 1987, Ferguson, with his mother as next friend, filed in state court a timely motion for post-conviction relief. For purposes of this petition, the relevant claims were two: an ineffective-assistance-of-counsel claim based on trial counsels' failure to investigate and present mitigation evidence, and a *Hitchcock* claim based on the judge's erroneous jury instructions.

Ferguson presented testimony from several family members about his childhood, his alcoholic father's death, his mother's physical abuse, and how

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each juror to confirm that a majority of them had voted to recommend death. The first two jurors, however, understood the judge to ask how each juror had voted, and the first two indicated that they had voted to spare Ferguson's life. The judge immediately halted the poll to clarify that the jurors were to indicate only whether the foreman's announcement of a death recommendation corresponded with the majority's decision. App. 24a & n.17; R.3151. Florida is an "outlier" state; it is "the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote." *State* v. *Steele*, 921 So. 2d 538, 548-550 (Fla. 2005). *See* Fla. Stat. § 921.141 (2008).

[5] The Florida Supreme Court vacated the initial sentences due to sentencing errors. *Ferguson* v. *State*, 417 So. 2d 631 (Fla. 1982); *Ferguson* v. *State*, 417 So. 2d 639 (Fla. 1982). On remand, a new judge, who had not presided over either trial, re-imposed the death sentences without holding a sentencing hearing; he simply relied on the cold transcript of the previous sentencing proceedings. The Florida Supreme Court affirmed. *Ferguson* v. *State*, 474 So. 2d 208 (Fla. 1985).

Ferguson's behavior changed so radically for the worse after he was shot multiple times as a young man. Ferguson also presented evidence that his trial counsel had not obtained doctors' reports, hospital records, school records, or court records containing relevant mitigation evidence. The court denied Ferguson's claim of ineffective assistance of counsel and *Hitchcock* error, and the Florida Supreme Court affirmed. *Ferguson* v. *State*, 593 So. 2d 508, 510-511 (Fla. 1992).

E. Federal Habeas Proceedings.

In March 1995 Ferguson, with his mother as next friend, filed a federal habeas corpus petition in federal court.[6] His petition presented several arguments, but again only two are relevant here: (i) an ineffective-assistance-of-counsel claim for failing during the penalty phases of both trials to proffer *any* evidence of Ferguson's profound and longstanding mental illness or his savagely poor and violent childhood, and (ii) a *Hitchcock* claim.

Concurrent with the filing of his petition seeking habeas relief, Ferguson moved to stay proceedings due to his incompetence. The court denied that stay

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[6] Because Ferguson filed his petition in 1995, one year before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), pre-AEDPA law applies to his claim. *See Lindh* v. *Murphy*, 521 U.S. 320, 326-327 (1997). Under pre-AEDPA law, the prejudice inquiry under *Strickland* and the harmless error analysis under *Hitchcock* receive *de novo* review, as in post-AEDPA cases where the state court did not reach the issue of prejudice or harmless error. *See Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005) (applying *de novo* review where state court did not reach prejudice prong under *Strickland*); *Wiggins*, 539 U.S. at 534 (same).

motion four years later. Doc.#1, 4, 21. Ferguson filed a Second Amended Petition and again moved to stay proceedings based on his incompetence in September 2003. After holding an evidentiary hearing to determine Ferguson's competency, the District Court denied Ferguson's motion to stay and his habeas petition in the same ruling. Doc.#108, 109.

On Ferguson's ineffective-assistance claims, the District Court summarily concluded as to both cases that there could be no prejudice to Ferguson "[g]iven the overwhelming aggravating factors in [each] case." App. 118a. In evaluating the *Hitchcock* error, the District Court acknowledged that the trial court had given the jury an unconstitutional instruction to disregard nonstatutory mitigating evidence. But the court nonetheless concluded that the error in the Carol City trial was cured by a later instruction, and that the error in the Hialeah trial was "harmless" because—again—of the existence of "multiple serious aggravating factors." App. 123a. Ferguson appealed.

The Court of Appeals assumed that Ferguson's lawyers in both trials had been deficient in failing to discover and present any of the powerful mitigating evidence. App. 18a, 22a-23a. The panel concluded, however, that Ferguson could not satisfy the prejudice prong of an ineffective-assistance claim. In the panel's assessment, it was not reasonably probable that a jury would have imposed a different sentence in light of the multiple aggravating factors found in each case. App. 18a-20a, 23a. The panel further found that even though the jury instructions in both cases constituted a *Hitchcock* error, the error

was harmless, again because of the multiple aggravating factors in each case. App. 37a-38a.

It did not matter that Ferguson had spent the better part of the previous decade in state-run mental hospitals, that he had suffered a viciously troubled childhood, or that the jury that sentenced him to death had not heard any of this humanizing evidence. In the panel's estimation, only the "multiple, egregious aggravating factors" mattered. In reaching this result, the panel effectively endorsed a new rule of decision: that where aggravating factors are sufficiently numerous or "extreme," no amount of mitigating evidence can make a difference. App. 18a-20a, 23a, 37a-38a.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The Eleventh Circuit below—as it did in *Porter*—disregarded powerful mitigation evidence that would have established the "kind of troubled history [this Court] ha[s] declared relevant to assessing a defendant's moral culpability." *Porter*, 130 S. Ct. at 454 (citation omitted). The Eleventh Circuit did so because, in its view, none of this evidence would have reasonably "le[d] a jury to *disregard* [the] cruel circumstances [of the crimes] and impose a different sentence." App. 20a (emphasis added). But that is not the test, as this Court's intervening decision in *Porter* confirms. The correct inquiry instead is whether the sentencing jury was deprived of hearing "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability,' "

Porter, 130 S. Ct. at 454 (quoting *Williams*, 529 U.S. at 398), and thereby "establish 'a probability sufficient to undermine confidence in [the] outcome.'" *Id.* at 455-456 (quoting *Strickland*, 466 U.S. at 693-694). Because the Eleventh Circuit's rule squarely conflicts with *Porter* and this Court's other precedents, the petition should be granted.

A. The Eleventh Circuit's Decision Conflicts With This Court's Intervening Decision In *Porter*.

Three months after the Eleventh Circuit decided Ferguson's appeal, this Court announced its decision in *Porter*. There, the Court summarily reversed a different Eleventh Circuit habeas ruling, identifying precisely the same basic errors that plagued the panel's decision below. Because this Court's intervening decision in *Porter* squarely rejects the same approach that the Eleventh Circuit took in Ferguson's case, the petition should be granted and—if not considered on a plenary basis—at least vacated and remanded for further consideration in light of *Porter*.

Porter involved multiple murders and multiple aggravating factors (three), including a finding that the murders were "committed in a cold, calculated, and premeditated manner." *Id.* at 449. Porter's counsel presented no significant mitigating evidence during the sentencing phase of the trial, even though significant mitigation evidence—including evidence concerning the defendant's history of mental-health issues and his abusive childhood—was readily available. *Id.* The Eleventh Circuit had brushed all this mitigating evidence aside, emphasizing instead the "heavy weight" of the aggravating factors. *Porter*

v. *Attorney General*, 552 F.3d 1260, 1274 (11th Cir. 2008).

This Court unanimously and summarily reversed. Rejecting the Eleventh Circuit's narrow focus on the "heavy weight" of the aggravating factors, this Court clarified that the prejudice inquiry demands a wider aperture. That inquiry begins, this Court held, by examining what mitigating evidence the jury actually heard. For only then can a court assess whether "new evidence 'would * * * have altered the sentencing profile presented to the sentencing judge.'" *Porter*, 130 S. Ct. at 454 (quoting *Strickland*, 466 U.S. at 700). In Porter's case, the discrepancy between what the jury heard and what it *ought* to have heard was stark. His counsel during sentencing had "put on only one witness, Porter's ex-wife, and read an excerpt from a deposition." *Id.* at 449. But there was so much more Porter's counsel should have discovered and offered: Porter's "abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id.*

This Court concluded that counsel's deficiencies fundamentally prejudiced Porter at sentencing. *Id.* at 454. The evidence that counsel could have offered was "significant," *id.* at 448, and his jury had "heard absolutely none of that evidence, evidence which 'might well have influenced the jury's appraisal of [Porter's] moral culpability.'" *Id.* at 454 (quoting *Williams*, 529 U.S. at 398).

In reaching that result, this Court ruled that the contrary no-prejudice conclusion reached by the Eleventh Circuit and the Florida Supreme Court was

objectively unreasonable. *Id.* at 454 (both courts "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"). That is because the Eleventh Circuit and the Florida Supreme Court had unreasonably focused on—to the exclusion of virtually all else—the "heavy weight" of the aggravating factors and the brutality of this "cold, calculated, and premeditated murder." *Porter*, 552 F.3d at 1272. But even though the "cold, calculated, and premeditated" factor "is one 'of the most serious aggravators set out in [Florida's] statutory scheme,'" *id.* at 1271 (citation omitted), this Court explained that an exclusive focus on aggravating factors is wrong. As the Court reaffirmed, "[w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter*, 130 U.S. 455-456 (quoting *Strickland*, 466 U.S. at 693-694). And "Porter ha[d] done" exactly that. *Id.* at 456.

As has Ferguson. This, too, is "not a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.'" *Id.* at 454. Whereas Porter's counsel put his ex-wife on the stand and read from a deposition, Ferguson's lawyer in the first trial put only Ferguson's mother on the stand. Even then, he managed to elicit 76 words of perfunctory testimony before excusing her. Counsel in the second trial managed to do even worse. He called Ferguson's mother to the stand, only to excuse her immediately after she began sobbing on the witness stand. The upshot: The jury at both trials "heard almost

nothing that would humanize [Ferguson] or allow them to accurately gauge his moral culpability." *Id.*

And there was, of course, a trove of evidence that would have done just that. *See supra* 5-10. Had Ferguson's counsel been effective, the judge and jury would have heard how Ferguson spent most of a decade in state-run mental hospitals. R.3093, 3098. They would have heard how during that span he was examined at least eleven times, by seven different state-appointed doctors, and that every single one diagnosed Ferguson as schizophrenic, psychotic, or hallucinating. R.1589-1601; Hrg.Exs.34-43. They would have heard and read the reports of these psychiatrists, many of which concluded that Ferguson had "grossly impaired" judgment, that he cannot "understand[ ] the nature and consequences of his acts," and that he therefore should remain committed "for long-term psychiatric treatment." Hrg.Ex.36. They would have heard that, during one of Ferguson's brief respites from Florida's mental hospitals, he had been arrested on robbery charges but was ultimately found not guilty by reason of insanity. R.3054. And they would have heard, of course, of the abuse, violence, and privation Ferguson experienced as a child. *See supra* 5-7.

But as in *Porter*, Ferguson's judge and jury "heard absolutely none of that evidence." 130 S. Ct. at 454. And as in *Porter*, this was precisely the sort of "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability.' " *Id.* (citation omitted). In short, " 'there exists too much mitigating evidence that was not presented to now be ignored.' " *Id.* at 455 (citation omitted).

The Eleventh Circuit though did ignore that evidence—for virtually the same reasons that it had identified in Porter's case. The *Porter* panel discounted the significant undisclosed mitigation evidence because of the "heavy weight" of the aggravating factors and the brutality of the "cold, calculated, and premeditated" murder. *Porter*, 552 F.3d at 1272. The *Ferguson* panel used a different adjective—"extreme"—but the substantive rule it applied was essentially the same. Because the undisclosed mitigation evidence here, as in *Porter*, "establishe[s] 'a probability sufficient to undermine confidence in [the] outcome' " of the sentencing phase, the petition should be granted. *Porter*, 130 S. Ct. at 455-456 (citation omitted). At the very least, the petition should be granted, the judgment vacated, and the matter remanded to the Eleventh Circuit for further consideration in light of this Court's intervening decision in *Porter*. *See Wellons* v. *Hall*, 130 S. Ct. 727, 731 (2010); *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

B. The Eleventh Circuit's Decision Conflicts With *Rompilla*, *Wiggins*, *Williams*, And Other Precedents Of This Court.

Not only does the Eleventh Circuit's prejudice analysis run afoul of *Porter*, but it also contradicts the way this Court has assessed prejudice in other recent cases. In *Rompilla*, the Court assessed whether a defendant sentenced to death based on three aggravating circumstances was prejudiced by a mitigation case consisting entirely of five family members' "beseech[ing] the jury for mercy, saying that they believed Rompilla was innocent and a good man." 545 U.S. at 378. Rompilla's counsel had not

reviewed Rompilla's prior conviction records, *id.* at 383-384, which contained leads to "significant mitigation evidence" demonstrating that Rompilla "had a troubled childhood and suffered from mental illness and alcoholism." *Id.* at 378-379.

The Court concluded that Rompilla was prejudiced by his counsel's failure to explore and present that mitigating evidence to counter the State's evidence of aggravated culpability. *Id.* at 390-393. The unpresented mitigating evidence in *Rompilla* was remarkably similar to the evidence in this case: physical abuse during childhood, a generally disadvantaged upbringing, and an "extreme mental disturbance." *Id.* at 391-392. The Court weighed the totality of that mitigating evidence in holding that "the mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability." *Id.* at 393. The unpresented evidence thus "add[ed] up to a mitigation case that b[ore] no relation to the few naked pleas for mercy actually put before the jury." *Id.*

The same is true here. As in *Rompilla*, the fact that the jury was asked to appraise Ferguson's moral culpability without having heard evidence bearing directly on that assessment—his miserable background and his history of mental illness—undermines confidence in the jury's conclusion as to his moral culpability. Indeed, *Rompilla* counsels against exactly what the Eleventh Circuit did below: permitting the existence of aggravating factors to categorically preclude the possibility that mitigating evidence could have affected the jury's or judge's sense of moral culpability. In contrast to the

Eleventh Circuit's decision, *Rompilla* makes clear that mitigating evidence cannot be discounted just because a crime is "extreme."

Other decisions from this Court are to the same effect. In *Wiggins*, for example, the Court found prejudice because, "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537. In *Williams*, the Court reversed a lower court's finding of no prejudice because the lower court failed to evaluate "the totality of the available mitigation evidence." 529 U.S. at 397; *see id.* at 398 (explaining that mitigating evidence unrelated to aggravating factors "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case"). And in *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-113 (1982), the Court explained that consideration of mitigation evidence is necessary to ensure "a system of capital punishment that is at once consistent and principled but also humane and sensible to the uniqueness of the individual."

Ultimately, the prejudice inquiry "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Williams*, 529 U.S. at 393 n.17. By definition, a death sentence is unreliable and fundamentally unfair when it does not result from an accurate "individualized inquiry" into the particular moral culpability of the defendant. The Eleventh Circuit's reliance on the presence of "extreme" aggravating factors—and those factors alone—effectively guts this Court's

longstanding rule requiring death sentences to be based on individual considerations that help define a defendant's moral culpability. *See Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998) (capital sentencing requires a "broad inquiry into all relevant mitigating evidence to allow an individualized determination"); *Jones* v. *United States*, 527 U.S. 373, 381 (1999) (capital sentencing scheme, to be constitutional, must "ensure that capital sentencing decisions rest upon an individualized inquiry").

The Eleventh Circuit ignored the significant mitigating evidence that Ferguson's counsel never introduced during the penalty phases of his trials because "the facts of this case are extreme" and numerous aggravating factors were present. App. 18a-20a, 23a. But this Court's jurisprudence has never suggested that prejudice turns on a comparison of the *quantity* of aggravating or mitigating factors. *See, e.g.*, *Brewer* v. *Quarteman*, 550 U.S. 286, 294 (2007) (holding that mitigating evidence is not "a matter purely of quantity, degree, or immutability"). Rather, it is the quality of the evidence; how well that evidence illuminates the defendant's moral culpability. The Eleventh Circuit's flawed approach follows none of this Court's guidance on assessing prejudice from unpresented mitigation evidence. Review—and reversal—is warranted.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF AT LEAST FOUR OTHER CIRCUITS OVER THE TEST FOR EVALUATING PREJUDICE CAUSED BY UNPRESENTED MITIGATION EVIDENCE.

At least four federal circuits have rejected the rationale that the Eleventh Circuit adopted here (and in *Porter*). As one court of appeals recently put it, the suggestion that a defendant "suffered no prejudice because the brutality of his crime eclipses any mitigating evidence[ ] is a non-starter." *Walbey* v. *Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009).

The Sixth, Eighth, Ninth, and Tenth Circuits have all found prejudice under *Strickland*—even in the face of unspeakably atrocious crimes—where counsel failed to present the jury with the same sort of powerful mitigating evidence that Ferguson's lawyers failed to introduce.[7] Only the Eleventh Circuit has held that the "extreme" or "cruel" nature of a defendant's crime can outweigh the prejudice that inheres when counsel fails to offer the

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[7] In addition, the Fourth and Fifth Circuits have reached conclusions similar to the Sixth, Eighth, Ninth, and Tenth Circuits in cases involving a single heinous murder. *See Gray* v. *Branker*, 529 F.3d 220, 236 (4th Cir. 2008) (granting habeas relief on grounds of ineffective assistance of counsel where the jury returned a death sentence after finding three aggravating factors but was not told that the defendant "suffered from a severe mental illness," which "would surely have provided a significant boost to [the defendant's] mitigation case"); *Walbey*, 309 F. App'x at 804 (rejecting a so-called "brutality trumps" argument and holding that the fact that a defendant's crime was "extremely brutal" does not categorically defeat the prejudice prong of the ineffective-assistance analysis).

sentencing jury any meaningful evidence to mitigate the defendant's moral culpability, no matter how extensive or evocative that evidence is.

Tenth Circuit. In *Smith* v. *Mullin*, 379 F.3d 919 (10th Cir. 2004), the Tenth Circuit considered a habeas petition from a defendant sentenced to death for each of five murders (stabbing to death his wife and two stepsons and asphyxiating two step-daughters) where his counsel failed to present mitigation evidence during the penalty phase of his trial. *Id.* at 924, 944 n.12. The case involved 24 aggravating circumstances: four in his wife's murder and five in each child's murder. *Id.* at 944; *Smith* v. *State*, 932 P.2d 521, 539 (Okla. Crim. App. 1996).

The court found that the "meager presentation of mitigating evidence fell below the constitutional minimum," in light of the "significant" mitigating evidence that could have been—but was not—presented. *Smith*, 379 F.3d at 939, 941. All counsel had done during sentencing was to call Smith's family and friends to testify that they loved him and that he was kind and considerate. But his counsel "made no attempt to explain how this kind and considerate person could commit such a horrendous crime, although mental health evidence providing such an explanation was at his fingertips." *Id.* at 939-940. That mental-health evidence included that Smith nearly drowned as a child, had mental impairments for which his family could not afford treatment, was "beaten by his classmates" for being "slower," and was abused by his aunt as a child. *Id.* at 941-942.

Although recognizing that the "case in favor of the death penalty was strong," *id.* at 944, the Tenth

Circuit nevertheless concluded that the petitioner was prejudiced because the mitigation evidence that his counsel failed to present during the penalty phase was "exactly the sort of evidence that garners the most sympathy from jurors." *Id.* at 942. Because juries " 'are more likely to vote for life rather than death sentences in cases where there is * * * clear and clearly presented evidence that the defendant has suffered from some form of mental illness,' " the Tenth Circuit concluded that Smith was prejudiced by his counsel's failure to present this evidence. *Id.* (citation omitted). As the court explained, had the jury known of this mitigating evidence and therefore been able to place "this compelling explanation for his behavior [ ] 'on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.' " *Id.* at 944 (quoting *Wiggins*, 539 U.S. at 537).

Ninth Circuit. In *Correll* v. *Ryan*, 539 F.3d 938, 940 (9th Cir. 2008), the habeas petitioner had been sentenced to death for a triple homicide. Four aggravating circumstances applied, including that the murders "were committed in a cruel, heinous, and depraved manner." *State* v. *Correll*, 715 P.2d 721, 734 (Ariz. 1986); *Correll*, 539 F.3d at 948.[8] But during the penalty phase "defense counsel put on no affirmative penalty phase defense whatsoever," *id.* at 946, and "[t]he entirety of his oral argument at the

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[8] Correll and an accomplice robbed the victims, bound them with duct tape, drove them into the desert, and shot them one by one "to cold-bloodedly eliminate any and all witness[es] to the robbery." *Correll*, 715 P.2d at 734. The third victim suffered through multiple misfires before they killed her. *Id.*

penalty phase consists of approximately 7 pages of transcript." *Id.* at 948.

The Ninth Circuit found that counsel had been ineffective because "there was a substantial amount of classic mitigating evidence that could have been presented, but was not." *Id.* at 952. And the court found prejudice because this "classic" evidence involved "a history of drug addiction," an "abusive childhood," and "evidence of Correll's psychological disorders." *Id.* at 950, 952. Correll had been committed to psychiatric institutions at least twice, was described as "severely psychologically impaired," and had twice attempted suicide. *Id.* at 953. Despite the gruesome crimes for which the petitioner had been convicted, the Ninth Circuit faithfully applied this Court's precedents to conclude that this "substantial" mitigation evidence, when "taken together, is sufficient to raise a presumption of prejudice under the Supreme Court's standard in *Wiggins*." *Id.* at 953-954 (citing *Wiggins*, 539 U.S. at 534-538).

Eighth Circuit. Likewise, in *Simmons* v. *Luebbers*, 299 F.3d 929 (8th Cir. 2002), the Eighth Circuit found that counsel's failure to present any meaningful mitigation evidence prejudiced the petitioner, even though the jury had convicted him of two disturbing murders and found multiple aggravating factors to exist.[9] The juries found that

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[9] Simmons brutally murdered two women. He "savagely beat[ ] and strangled [one of them] for four to five minutes before" she died. *State* v. *Simmons*, 955 S.W.2d 729, 752 (Mo. 1997). He bound the other's ankles and hands, forced a cloth gag down her throat, and then tied a cloth over her mouth. *Id.* at 758. He left each woman's body to decompose in her apartment and pawned

both murders involved "depravity of mind" and were "outrageously and wantonly vile, horrible, and inhuman." *Simmons*, 955 S.W.2d at 777; *Simmons*, 815 S.W.2d at 427-428. In one case, the jury found four statutory and several nonstatutory aggravating circumstances; in the other, the jury found one statutory and eight nonstatutory aggravating circumstances. *Simmons*, 955 S.W.2d at 759; *Simmons*, 955 S.W.2d at 740.

Simmons claimed ineffective assistance of counsel during the penalty phase because "his attorneys did not introduce available mental health information or mitigating evidence in an attempt to persuade the jury to spare his life." *Simmons*, 299 F.3d at 935. Although counsel called a handful of witness to provide perfunctory testimony about their love for the defendant, no one "testified about the beatings suffered by Simmons as a child, his fear of those beatings, his father's alcoholism, his parents' violent relationship, or his victimization in [an assault in] Chicago." *Id.* at 937.

As the Eighth Circuit explained, without this mitigation evidence, "the jury was allowed to conclude that Simmons's violent behavior was simply the result of his wicked and aggressive nature." *Id.* at 936. As the Court explained, "a vivid description of Simmons's poverty stricken childhood, particularly the physical abuse, and the assault in Chicago, may have influenced the jury's assessment of his moral culpability" and could have persuaded individual jury members to "vote[ ] against the imposition of the death penalty." *Id.* at 939. Despite the

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the jewelry he had stolen from them. *State* v. *Simmons*, 815 S.W.2d 426, 427-428 (Mo. 1991).

"overwhelming amount of aggravating evidence that had been proffered by the state," *id.* at 938, his counsel's failure to present any evidence during the penalty phase of Simmons's traumatic and abused childhood was sufficient to "undermine [the court's] confidence in the outcome." *Id.* at 939.

Sixth Circuit. The Sixth Circuit reached the same conclusion in *Dickerson* v. *Bagley*, 453 F.3d 690 (6th Cir. 2006). There, the defendant had been sentenced to death on each of two counts of aggravated murder involving multiple aggravating elements. *Id.* at 691. At the penalty phase of the trial, the only significant mitigation evidence his counsel offered was "two mental health experts who had interviewed Dickerson for an hour and a half to determine if he was sane" and testified that he was "sane but in emotional turmoil." *Id.* at 697. The Sixth Circuit held his counsel's performance deficient for failing to investigate and present mitigation evidence related to Dickerson's family background and his mental health, including that he had a borderline personality disorder. *Id.* at 696.

The Sixth Circuit concluded that "[i]f the sentencer had also learned that Dickerson was raised in a home where his biological father denied his relationship, where he was called 'the moron,' and was surrounded by 'pimps, prostitutes, and drug dealers,' it is much more likely that the sentencer would have seriously contemplated a sentence of life imprisonment based on reduced culpability." *Id.* at 699. Although "the fact finder might still have imposed the death penalty even if all of the mitigating evidence had been revealed," the Sixth Circuit concluded that "the likelihood of a different

result is 'sufficient to undermine confidence in the outcome.'" *Id.* at 698 (citation omitted). Citing *Rompilla*, the Sixth Circuit explained that whether the jury might still have decided on the death penalty "is not the appropriate test * * * . Instead, [a court] must ask whether 'the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the petitioner's] culpability.'" *Id.* at 699 (citation omitted). Ultimately, the failure of Dickerson's counsel to conduct and present a complete and thorough mitigation case "prejudiced the outcome of the sentencing phase of his trial." *Id.*

Each of these decisions conflicts with the Eleventh Circuit's prejudice analysis. And that divergence in approach has serious implications for the fair and uniform administration of justice. The same facts here would have supported a finding of prejudice in at least the Sixth, Eight, Ninth, and Tenth Circuits (and arguably the Fourth and Fifth as well, *supra* n.7), while leaving defendants like Ferguson on death row in the Eleventh Circuit. The fair administration of capital punishment cannot arbitrarily turn on accidents of geography. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose" of the Court's certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals").

III. THE ELEVENTH CIRCUIT'S *HITCHCOCK* ANALYSIS CANNOT BE SQUARED WITH THIS COURT'S PRECEDENT.

A trial court indisputably commits constitutional error if it instructs a jury to consider only statutory mitigating factors. *Hitchcock*, 481 U.S. at 398-399.

Yet, that is exactly what happened here, as the Eleventh Circuit recognized. App. 31a, 35a. That error rendered Ferguson's death sentences invalid if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993). And because the prosecution bears the burden of establishing that a death sentence should stand despite the *Hitchcock* error, doubt as to whether there was the requisite "substantial and injurious effect" requires a ruling in the defendant's favor. *O'Neal* v. *McAninch*, 513 U.S. 432, 436 (1995).

The Eleventh Circuit's conclusion that the *Hitchcock* errors did not have a substantial and injurious effect on the jury's deliberations and sentence is wrong—and in conflict with the Court's repeated emphasis on the importance of mitigating evidence, and especially mental-health evidence, in shaping a jury's assessment of moral culpability. Indeed, in *Porter*, this Court clarified that "[u]nder Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating." *Porter*, 130 S. Ct. at 454-455 (citing *Hoskins* v. *State*, 965 So. 2d 1, 17-18 (Fla. 2007) (per curiam)). And since this Court's *Eddings* decision in 1982—shortly after Ferguson's trials—it has been clear that " 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor,' " not just statutory mitigating factors. *Id.* (quoting *Eddings*, 455 U.S. at 112).

Here, however, the trial court specifically instructed the Hialeah jury *not* to consider the

evidence they heard about Ferguson's psychiatric background during his attempted insanity defense or the first-hand manifestations of his psychotic condition that they saw during trial.[10] Despite this conceded *Hitchcock* error, at least two jurors in the Hialeah case voted against the death penalty. App. 24a & n.17; *see supra* n.4. The trial court similarly instructed the Carol City jury not to consider the fact that Ferguson engaged in bizarre conduct at trial (including undressing in open court and interrupting the proceedings for irrational reasons), tried to dissuade Francois from killing the victims, and made efforts to comfort some of the victims. The Eleventh Circuit held that these constitutional errors were harmless. App. 34a.

The panel's ruling should again be reviewed and reversed. Contrary to the panel's decision, the *Hitchcock* errors had a "substantial and injurious effect or influence" on the jury's deliberation as to whether Ferguson was sufficiently morally culpable to warrant a death sentence. The jury's ability to consider the mental-health evidence, in particular, was limited to "the high standards required to meet" the statutory mitigating factors of "*extreme* mental or emotional disturbance and *substantial* impairment." App. 33a n.24 (emphasis in original) (citing *Booker* v. *Dugger*, 922 F.2d 633, 636 (11th Cir. 1991) (commenting on the difficulty in meeting these standards). As a result, the jury was precluded from considering nonstatutory mental mitigation. *See Porter*, 130 S. Ct. at 455 n.7 (recognizing that Florida

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[10] Examples of this mitigating evidence can be found at RCC 926-927, 1034-35, 1079-81; RH 378, 476-477, 481, 949, 958, 963, 967, 1003-04, 1036; R.1742, 1749-50, 3156.

permits a defendant to present both statutory and nonstatutory mental mitigation evidence). That sort of mental-health evidence, however, is among the mitigation evidence that resonates most strongly with jurors. *See Porter*, 130 S. Ct. at 454; *Wiggins*, 539 U.S. at 535.

The flaw in the Eleventh Circuit's decision is that, as in *Porter*, it is not "reasonable to discount entirely the effect that [nonstatutory mitigating] testimony might have had on the jury or the sentencing judge," had either considered it. *Porter*, 130 S. Ct. at 455. The panel's view that the *Hitchcock* errors were harmless because the juries found "multiple" or "numerous" aggravating factors employs the same deficient analysis that the panel adopted in its ineffective-assistance-of-counsel ruling. App. 34a-35a, 38a. Determining the influence or effect of a *Hitchcock* error is not a finger-counting exercise comparing the number of aggravating factors to the number of non-statutory mitigating factors the jury was instructed not to consider. Rather, the standard looks at the qualitative impact of the missing evidence on the assessment of moral culpability. *See Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) (holding that "[t]he inquiry cannot be merely whether there was enough to support the result" in the absence of the error). In assessing the error's impact, "it is not the [reviewing] court's function * * * to speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* at 763. Instead, so long as the error may have "substantial[ly] influence[d]" the jury's assessment of Ferguson's moral culpability in sentencing him to death, or if there is "grave doubt" as to the influence, then the death sentence "cannot stand." *O'Neal*, 513

U.S. at 437. The Court has also made clear that "uncertain[ty]" about the influence should be treated "as if it affected the verdict." *Id.* Because the Eleventh Circuit's decision failed to recognize the effect of nonstatutory mental-health mitigation evidence in direct conflict with this Court's precedents, certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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